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The Center for  
**Environmental Law & Policy**

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RE: Draft Mitigation Options for the Impacts of New Permit Exempt Groundwater Withdrawals Report

Dear Ms. Wessel:

CELP is pleased to provide comments on the draft Report entitled “Mitigation Options for the Impacts of New Permit-Exempt Groundwater Withdrawals (“Report”). This Report contains a broad discussion of problems with permit-exempt groundwater withdrawals and some of the possible methods suggested for mitigating those impacts. CELP agrees that mitigation of permit-exempt withdrawals is a difficult problem and welcomes the Report’s discussion of issues such as the impact of water withdrawals in small sub-basins and the need to ensure that any mitigation is secured for the duration of the withdrawals.

CELP’s major issue with the Report is with its Recommendations. Most importantly, the Report seems to request that the Legislature provide authority for the use of “additional mitigation tools” such as out-of-time mitigation, out-of-place mitigation, out-of-kind aquatic habitat mitigation, or unspecified “other approaches.” However, the examples discussed in the Report simply do not support these approaches. Not only are there no examples given to show that out-of-time, out-of-place, or out-of-kind mitigation will actually work to protect instream flows, the Report correctly notes that many of these approaches are barred by Washington Supreme Court precedent. CELP suggests that the Recommendations section be deleted from the Report. Further, if Ecology plans to ask the legislature for additional statutory authority, any such request should also ask for authority to regulate the amount of water withdrawn from permit-exempt wells. This is discussed at p. 19 of the Report, but is not included among the possible increased statutory authority mentioned in the Recommendations. We also think it is important to point out that in the Background section, under Legislative Interest and Purpose of Report that the following sentence misrepresents the facts:

In 2015, the state Legislature introduced SB 5965 that would have required Ecology to prepare a report evaluating options for mitigating the impacts of permit-exempt groundwater withdrawals on base flows and minimum instream flows.

Report at 1.

It was in fact not the Legislature that introduced this bill but the Senate Agriculture and Natural Resources Committee. The House Agriculture and Natural Resources Committee version included additional alternatives to be studied, which were not included in this Report. At the time that this study was announced, CELP wrote to Ecology Director Maia Bellon, expressing our disappointment that Ecology had chosen to limit the alternatives in the study to those in the Senate version of the bill. A copy of that letter is attached to these Comments.

Other major issues, discussed in more detail below, include:

- The Report does not adequately address the concept of avoiding impacts altogether by requiring conservation (including metering of permit-exempt wells).
- The “out-of-kind” mitigation strategies proposed are problematic and the out-of-kind projects discussed have not actually been shown to be effective.
- Of the mitigation strategies discussed, the only ones that have been proven effective involve water-for-water mitigation, generally involving some form of water banking.
- The discussion of cisterns or hauled water is overly pessimistic and may overstate the cost of using these methods.

### **The Report does not provide support for its Recommendations**

The only concrete recommendations made by the report are that the Legislature “state its intention clearly through statutory amendment” and authorize mitigation tools including out-of-time, out-of-place, and out-of-kind mitigation for permit-exempt well impacts, and establish a management framework for such mitigation. This section appears to be a plea for relief from the Washington Supreme Court’s recent *Swinomish* and *Foster* decisions, rather than a constructive discussion of techniques that might actually be effective in mitigating for permit-exempt well use. Even if the Legislature were to grant authority to use out-of-time, out-of-place, or out-of-kind mitigation techniques, there is nothing in the Report to show that these approaches would actually be effective. This section should be deleted.

### **Avoiding impacts is preferable to compensation**

Out-of-kind mitigation is essentially “compensation” as defined in the Council for Environmental Quality regulations: “(e) Compensating for the impact by replacing or providing substitute resources or environments.” 40 CFR 1580.20. Avoiding or minimizing an impact is preferable to after the fact compensation. This is especially relevant with respect to impacts on streamflows, where the very presence of water in the stream represents the environmental value to be protected. Attempts to mitigate loss of water through other environmental enhancements are unlikely to be able to replace the habitat lost through reduced flows and CELP urges that avoiding impacts on streamflows be given preference over after-the-fact compensation. Here, the ability to restrict the

amount of water used by permit-exempt wells would be of great benefit. To facilitate this, all permit-exempt wells should be metered (this can be done under Ecology's existing authority; see RCW 90.44.050). Further, while restricting withdrawals from permit-exempt wells is mentioned on p. 19 of the Report, the Recommendations omit the ability to do so from the discussion of possible authority that could be granted by the Legislature.

**The discussion of avoiding permit-exempt well impacts through use of rainwater collection or trucked water lacks relevant cost data.**

Cost estimates were provided for either construction of cisterns or delivery of trucked water, apparently for systems that were adequate supplying water on a year-round basis. However, in many (most?) cases, permit-exempt well use would be possible except during the parts of the year when streamflows are low. Because of this, hauled water would only have to be delivered for part of the year, which would reduce the recurring cost of having water delivered. If water must only be stored for part of the year, it is also possible that cistern capacity (and therefore cost) could in reality be smaller than what is contemplated in the Report.

While the Report does state that hybrid rainwater/hauled water systems would likely be less expensive, it also says that cost estimates are not available, and there is no discussion of the cost of augmenting well use with cisterns or hauled water. In the interest of making a fair comparison of possible mitigation alternatives, such cost figures should be generated and included, and broken down into the capital cost and the annual operational cost. This would facilitate an "apples-to-apples" comparison with other mitigation strategies. Finally, although Department of Health regulations may now pose impediments to rainwater collection or cistern use, it is not out of the question that such regulations could be modified. Any Recommendations section should include a recommendation that Ecology work with the Department of Health to resolve such conflicts.

**Neither of the Teanaway River area mitigation projects described demonstrates that out-of-kind or out-of-place mitigation is effective.**

The Report states that "[i]n the right circumstances, it is possible to provide greater benefit to instream resources than strictly in-kind mitigation could provide." Report at 20. However, nothing in the Report supports this conclusory statement. The Report does cite two examples of out-of-kind (instream habitat enhancement) or out-of-place (adding water downstream) mitigation. However, neither actually demonstrates effective mitigation for the permit-exempt withdrawals, let alone a greater improvement than simply replacing the withdrawn water would achieve.

A) The Indian Creek large woody debris project

This project is a study, not an actual example of the successful use of out-of-kind mitigation. As noted in the Report, "[t]his project will primarily rely on the data generated to assess whether the expected landscape changes, floodplain reconnection, and hydrologic benefits result from the LWD project. Report, p. 56. Further, "[t]here are no specific performance objectives" associated with this project. *Id.* While gathering information about the effect of such measures may have value, it does not in any way demonstrate that this kind of work can substitute for mitigation that actually keeps water in the streams.

B) Tillman Creek flow augmentation.

This project is an example of out-of-place mitigation, proposing to put some water back in the stream (by allowing water to flow from an unnamed tributary to Tillman Creek) to offset consumption by up to 50 new homes that would be constructed further upstream in the watershed. Here, there is no specific data regarding how much water would be consumed by the new homes, or how effectively this use would be mitigated. While fish habitat in the lower reaches of Tillman Creek might be improved, the impacts of the new withdrawals would occur further upstream. There should be discussion of the local impacts of the water use. As a different section of the Report notes, such impacts in upper tributaries are difficult to mitigate.

Because there is no data on whether either of these proposals actually accomplished any significant mitigation, neither can support a recommendation that out-of-kind or out-of-place mitigation be adopted as an allowable approach to impairment of instream flows.

**The most effective mitigation method discussed in the report, water banking, was omitted from the Recommendations.**

Of the approaches discussed in the Report, the *only* one that is shown to have successfully provided mitigation is water banking. As discussed for the Dungeness River system, the Yakima Basin, and the SVRP and Walla Walla aquifers, a mitigation scheme based on water banking and transfer of rights can provide water-for-water mitigation where it is needed, at least where senior rights can be acquired. This approach is also being implemented in the Skagit Basin. Report at 34; 36. CELP believes that if the Report is to contain recommendations, expanded use of water banking should be included.

**The Report should more fully address permanence of funding and management for mitigation projects.**

The Report correctly notes that mitigation plans must describe an approach for implementing and monitoring mitigation “for as long as the water is withdrawn.” Report at 16. This is also reflected in Ecology Policy 2035 (sustainability of the mitigation scheme, including funding, to be considered before approval). Permit-exempt wells are likely to be used to supply domestic water for rural development and this water use is likely to be permanent. This means that any mitigation for those withdrawals must also be permanent, so that streamflows are not ultimately compromised. Out-of-kind mitigation proposals, such as the large woody debris project on the Teanaway or stream channel restorations, are unlikely to be self-sustaining and will require periodic maintenance and/or monitoring.

In order to ensure that any such mitigation is permanently effective, CELP suggests that any proposal needs to include a dedicated source of funding, in perpetuity. Funding provided through State appropriations (for example, as part of Ecology’s budget) would be vulnerable to political changes and perceived financial pressures. Funding established to support mitigation must not be vulnerable to future legislative actions or budget crises, and it is likely that a dedicated trust account or bond would be required to meet these conditions.

**Issues with the discussion of instream flow setting**

CELP is puzzled as to why the discussion of instream flow setting was included in the Report. It is outside the scope of the Legislature’s request in SB 5965 and does not speak to mitigation options. This section’s discussion of habitat index states that the same habitat index may be attained by providing a given flow, modifying the channel in certain ways, or “since the index is assessed over a length of stream channel, if the channel length were changed the index might also change,” citing these “alternative means of achieving a target habitat index as “another means of mitigation.” Report at 20. The third of these approaches, changing the channel length that is assessed, suggests nothing more than changing the way that the impact on a stream is assessed until the desired answer is produced. It would have absolutely no beneficial effect on habitat, streamflow, or the ecosystem. This suggestion should be deleted from the report.

**“Watershed approaches” to mitigation are completely unsupported in the Report**

While there is extensive discussion of “watershed approaches” to mitigation, the Report provides no concrete example of how such an approach might be implemented, what it might look like, and no evidence that such an approach has been successfully used (in fact, the report notes that “[no specific proposal]” has been advanced for “watershed-wide activities” to protect streamflows). Report at 26. As noted, the state has not developed “benchmarks to determine success” in this kind of approach and the suggestions made are quite vague. In the one example that is discussed in any detail (the Dungeness watershed), this approach was apparently considered but a water banking system was ultimately adopted instead. Report at 26.

Please contact me if you would like to discuss CELP’s comments. Thank you for your attention to this matter.

Sincerely,

/s/ Dan Von Seggern /s/

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